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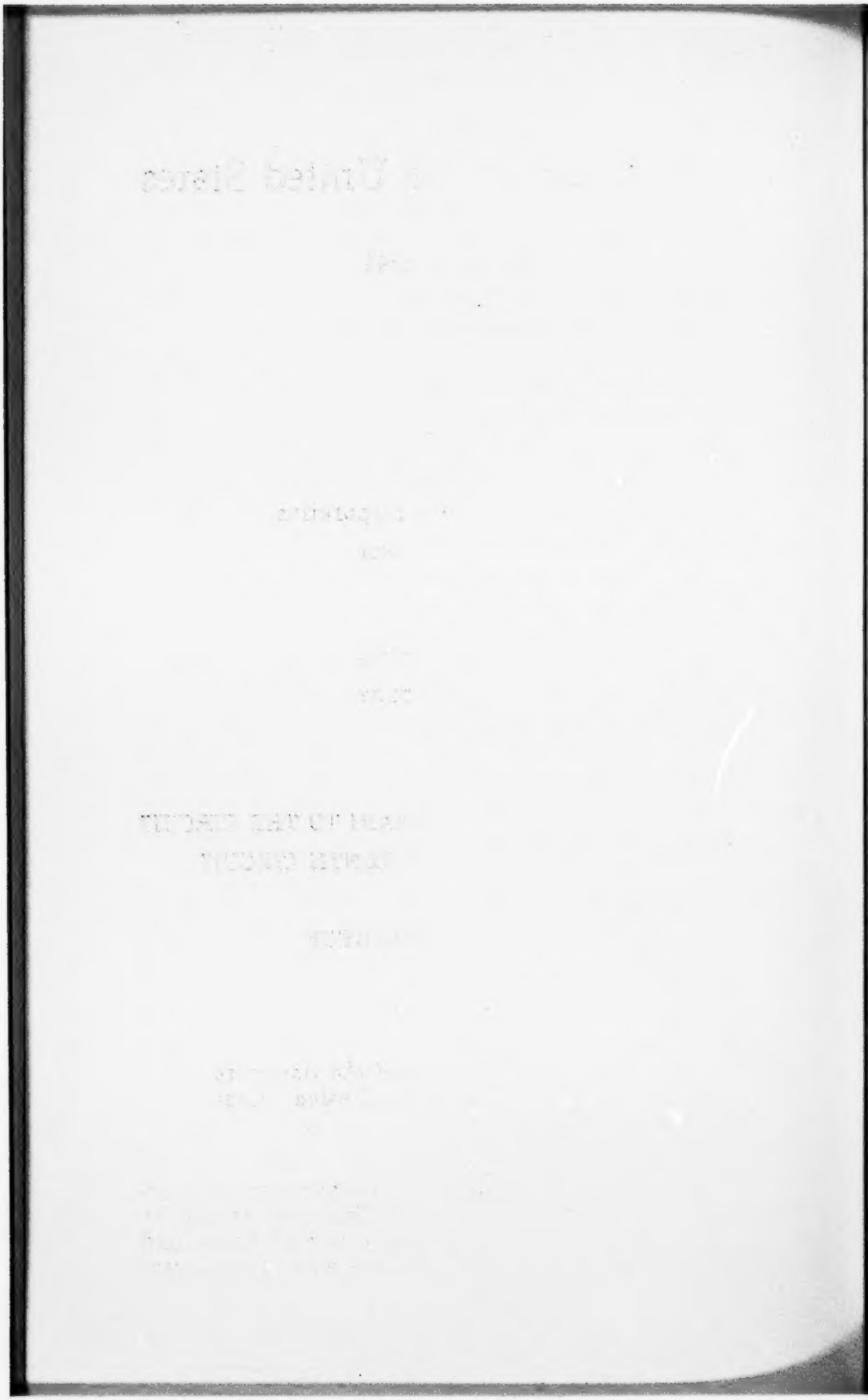

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

NO.....

W. W. CLYDE & CO., a corporation,
DEFENDANT, PETITIONER,

vs.

MRS. SADA DYESS,
PLAINTIFF, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Now comes W. W. Clyde & Co., a corporation duly organized under the laws of the State of Utah and having its principal place of business in Springville in said State, and respectfully petitions this Court to issue a writ of certiorari

directed to the Circuit Court of Appeals for the Tenth Circuit, and in support of its pettion respectfully shows:

I.

Summary and Short Statement of the Matter Involved.

Plaintiff, Sada Dyess, a citizen and resident of Texas, brought this action against Petitioner, W. W. Clyde & Co., a corporation of the State of Utah, to recover from the petitioner damages for personal injuries sustained by her in the State of Utah, as the alleged result of the negligent operation of a truck owned and operated by the petitioner.

The facts in the case are not in dispute, and the following is a resume from the statement of facts in the case as they appear at pages 34 to 39 of the Record herein.

Plaintiff Sada Dyess and her husband, W. D. Dyess, are citizens and residents of Tyler, State of Texas, where they were married 16 years ago, and where they have ever since resided. Her husband for the past 7 years, until the time of trial, was engaged in a nursery busines, doing business in some 15 or 16 states, including the State of Utah. In the spring of 1940, W. D. Dyess left Tyler, Texas, accompanied by his wife and child, for the purpose of making a trip in the furtherance of the above mentioned nursery business through the states of Colorado and Utah, in an automobile purchased by him about a year previous to the time of the accident in Utah on June 13, 1940. Other employees of his nursery business were in Utah at said time. The parties contemplated a pleasure trip or vacation after their business had been completed in Utah; and their business having been completed, were returning to Tyler, Texas, at the time of the accident in Eastern Utah.

The plaintiff, Sada Dyess, testified that she was a guest of her husband on the trip, and the husband testified that he was the owner of the car, both of which gratuitous statements were conclusions of law, and were so regarded by the trial court.

As will be hereinafter pointed out in the brief, Texas is a community property state, and it was and is the contention of the petitioner that the nursery business as well as the automobile and the cause of action itself were, pursuant to the community property laws of the State of Texas, the common or joint property of husband and wife. The plain-

tiff referred to the nursery business which brought her and her husband to the State of Utah as "our business," and stated that her husband shared all things with her. (Record, p. 37)

The petitioner in its answer alleged that the negligence of the plaintiff's husband, W. D. Dyess, was a proximate cause of the accident (Record, p. 11), and the jury in answer to special interrogatories found that he, as well as defendant's truck driver, was negligent, and that the negligence of both was a proximate cause of the accident. (Record, p. 23) Petitioner pleaded the community property laws of the State of Texas, alleging that plaintiff's cause of action, as well as the nursery business and the car occupied by her at the time of the accident, were community property of plaintiff and her said husband. (Record, p. 18) The case was submitted by the trial court to the jury to return a general verdict.

A pretrial order was made by the Court (Record, p. 16), specifying the issues of law, among which were: whether under Texas law the car in question was community property; whether the plaintiff was chargeable with her husband's negligence, if any, as her agent in the operation of the car; and whether plaintiff and her husband were engaged in a joint enterprise.

It is evident from the foregoing that the trial court treated the question of the ownership of the nursery business, the ownership of the car, as well as the ownership of the cause of action and the recovery, if any, therefrom, as questions of law.

The plaintiff admitted that the Texas laws pleaded in the amendment to defendant's answer were in existence as alleged. (Record, p. 37)

At the conclusion of the testimony in the case, petitioner moved the court for a directed verdict in its favor, on the ground, among other things, (a) that the evidence shows that a proximate cause of plaintiff's injuries was the negligence of her husband, W. D. Dyess; (b) that his negligence is imputable to the plaintiff, Sada Dyess; (c) that she is chargeable with such negligence, and hence she is barred from any recovery in this action as a matter of law; (d) that the plaintiff has established affirmatively that she and her husband were each guilty of negligence, which negligence proximately contributed to the plaintiff's injury. This motion was made

pursuant to Rule 50 of the Rules of Civil Procedure for the District Courts of the United States. (Record, p. 37)

Said motion was taken under advisement by the Court and an exception taken by the defendant.

The court then stated that he would submit the case to the jury on written interrogatories for the jury to determine if the defendant was negligent, whether W. D. Dyess was guilty of negligence, and if so if the same was a proximate cause of the accident, and whether the plaintiff herself was guilty of negligence, and if so whether such negligence was a proximate cause of the accident; at the same time stating that he would submit the case to the jury to return a general verdict, reserving for later determination, in the event the jury should find that the said W. D. Dyess was guilty of negligence and that the same proximately contributed to the cause of the accident, the question of law as to whether or not such negligence should be imputed to the plaintiff herself and bar her recovery. (Record, p. 38)

The defendant requested the court to give its requested instruction No. 1, to return a verdict in favor of the defendant, no cause of action; its requested instruction No. 2 to the effect that the negligence of W. D. Dyess, if any, must be imputed to the plaintiff; its requested instruction No. 3 to the effect that if the negligence of W. D. Dyess in any way proximately contributed to the accident that such negligence must be imputed to the plaintiff; and its requested instruction No. 4 to the effect that in the event the jury should find W. D. Dyess guilty of negligence proximately contributing to the accident, that the plaintiff could not then recover, which requested instructions the court refused to give, noting upon each of them "question reserved." (Record, p. 38)

The defendant excepted to the reservation made by the court of the questions so reserved, and the failure of the court to instruct the jury as requested in said instructions.

The jury, on May 3, 1941, as shown by the record herein, answered the several interrogatories propounded by the court, finding that the defendant was negligent and that its negligence was a proximate cause of the accident and the injuries to plaintiff; that W. D. Dyess was negligent, and that his negligence was a proximate cause of the accident; that the plaintiff Sada Dyess herself was not guilty of negligence; and returned a general verdict in favor of the plaintiff in the sum of $10,000.00. (Record, p. 23)

Thereafter, and on May 12, 1941, the defendant made and filed herein its Motion for Judgment Notwithstanding the Verdict, which motion was duly argued to the court and denied by it on May 27, 1941. (Record, pp. 25-31)

The Circuit Court of Appeals of the Tenth Circuit affirmed the judgment herein by an opinion dated February 26, 1942 (Record, p. 43), reported in 126 F. (2d) 719.

II.

The Jurisdiction of the United States Supreme Court.

The jurisdiction of this Court to review the decision of the Circuit Court of Appeals of the Tenth Circuit is invoked under Section 240 (a) of the Judicial Code of the Act of February 13, 1925, as amended, for the following special and important reasons:

A. The decision of the Circuit Court of Appeals is at variance with the recently established rule of law laid down by the Supreme Court of the United States with reference to Conflict of Laws in the cases of *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.*, 313 U. S. 487, 85 L. Ed. 1477, and *Griffin, Admr. v. McCoach, Trustee*, 313 U. S. 498, 85 L. Ed. 1481.

B. The decision herein of the Circuit Court of Appeals of the Tenth Circuit, reported in 126 F. (2d) page 719, is in conflict with the decision of the Circuit Court of Appeals of the Ninth Circuit, in the case of *Jones, Appellant, v. Weaver, Admx., Appellee*, 123 F. (2d) 403, where the identical question was raised and decided, and an opposite result reached.

C. The Circuit Court of Appeals, by its decision herein, has decided an important question of law in conflict with applicable local decisions of the Supreme Court of the State of Utah. *Nielsen v. Watanabe*, 90 Utah 401, 62 P. (2d) 117.

D. The action of the court below sustaining the judgment herein is contrary to the Due Process Clause of the Fifth Amendment to the Constitution, providing that no person shall be deprived of his property without due process of law.

III.

Questions Presented.

1. Whether plaintiff, a resident of Texas, a community property state, coming to the State of Utah with her husband in an automobile driven and operated by him in the furtherance of their nursery business, community property of plaintiff and her husband, and being there injured while an occupant of such automobile, can recover against a third party, where the jury finds that the husband was also guilty of negligence proximately contributing to her injuries, unaffected by the fact that the cause of action itself, under the laws of Texas, is the community property of plaintiff and her husband.

2. Whether the Circuit Court of Appeals erred in failing to follow the very recent decisions of this Court in the cases of *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.*, 313 U. S. 487, 85 L. Ed. 1477, and *Griffin, Admr., v. McCoach, Trustee*, 313 U. S. 498, 85 L. Ed. 1481, in which it was held that in diversity of citizenship cases the Federal Courts must follow the Conflict of Laws rules prevailing in the states in which they sit; and in accordance with such decisions, in failing to follow and apply to this case the applicable Conflict of Laws rules prevailing in the State of Utah, as determined in the case of *Nielsen v. Watanabe*, 90 Utah 401, 62 P. (2d) 117, holding that a plaintiff wife from Idaho, a community property state, injured within the State of Utah in an automobile accident, cannot recover where the driver husband was guilty of contributory negligence.

3. Whether under section 40-2-4, Revised Statutes of Utah, 1933, permitting a wife to bring action in her own name for personal injuries, and the Conflict of Laws rules prevailin the State of Utah, plaintiff was the sole owner of the cause of action and recovery therefrom, unaffected by the fact that the cause of action itself, under the laws of Texas, is the community or common property of plaintiff and her husband.

4. Whether the Utah statute above referred to, as construed by the Supreme Court of the State of Utah in the case of *Nielsen v. Watanabe*, supra, embraces both substantive and remedial rights.

5. Whether the Circuit Court of Appeals erred in holding that notwithstanding that under the laws of Texas the cause of action herein sued upon was the community prop-

erty of husband and wife, that such Texas laws had no application whatsoever.

6. While the Circuit Court of Appeals in its decision quotes from and accepts the Texas community property laws, nevertheless, contrary to the decisions of the courts of that state, interpreting such laws, it erred in refusing to accept the presumption that the automobile in question was the property of the community, and further erred in placing the burden of proving that said automobile was the property of the community upon the petitioner, rather than upon the appellee to prove, pursuant to said presumption, affirmatively to the contrary.

7. The Circuit Court of Appeals erred in permitting the appellee upon appeal to depart from the theory upon which the case was tried in the trial court as is shown by the record herein, to-wit: that not only was the cause of action and the nursery business of the plaintiff husband, in the furtherance of which they were in the State of Utah, community property, but also the automobile in which plaintiff and her husband were riding at the time of the accident; and in permitting the appellee to contend in that court that the said automobile was the individual property of plaintiff's husband, merely because he stated that he was the owner, without showing the source of the funds with which it was purchased.

8. Because of such joint or community ownership of said automobile, the Circuit Court of Appeals erred in failing to apply and give effect to the decision of the Supreme Court of Utah in the case of *Fox v. Lavender*, 89 Utah 115, 56 P. (2d) 1049, which holds that where joint owners are present, the driver is operating on behalf of himself and the other present owner or owners, and as the agent of such other owner or owners, and that therefore husband and wife were engaged in a joint enterprise.

9. Whether the Circuit Court of Appeals erred in not holding that the trial court should have granted petitioner's motion for judgment notwithstanding the verdict.

IV.

Reasons for Granting The Writ.

A. The decision of the Circuit Court of Appeals is in conflict with the decisions of the Supreme Court of the United States with respect to Conflict of Laws.

B. The decision of the Circuit Court of Appeals is in conflict with the decision of the Ninth Circuit Court of Appeals on the same matter.

C. The decision of the Circuit Court of Appeals is in conflict with the decisions of the Supreme Court of the State of Utah.

D. The effect of the Circuit Court of Appeals' opinion herein is repugnant to the Due Process Clause of the Fifth Amendment of the Federal Constitution, in that it deprives the petitioner of property without due process of law, and permits a community consisting of husband and wife to recover for a tort to the wife proximately caused by the husband's negligence.

E. The public interest will be promoted by the establishment by this Court of a uniform rule of law.

F. The Circuit Court of Appeals, by its decision herein, so far sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, the petitioner prays that a Writ of Certiorari may be issued from this Court to the Circuit Court of Appeals for the Tenth Circuit, to certify the record to this court, to the end that the said case may be reviewed and determined by this Court as provided by law, and that the judgment of the Circuit Court of Appeals in this case may be reversed by this honorable Court.

ARTHUR E. MORETON,

Attorney for Defendant, Petitioner.

STATE OF UTAH
COUNTY OF SALT LAKE } ss.

ARTHUR E. MORETON, being first duly sworn on oath deposes and says: That he is attorney for the petitioner in the above entitled action; that he prepared the foregoing petition, knows the facts stated in said petition and the proceedings had in said cause, and the facts stated therein are true to the best of his knowledge and belief.

ARTHUR E. MORETON.

Subscribed and sworn to before me this 21st day of May, 1942.

ORETA RIGBY,
Notary Public
Residing at Salt Lake City, Utah.

(SEAL)

My Commission expires:
June 15, 1945.

CERTIFICATE OF COUNSEL

Comes now Arthur E. Moreton and certifies that it is his opinion that the foregoing petition is well founded as to matters of fact and as to matters of law, that it is not made for the purpose of delay, and that the decision of the Court in this case is erroneous and should be reviewed by this Honorable Court.

ARTHUR E. MORETON.

BRIEF IN SUPPORT OF PETITION

I.

OPINION OF COURT BELOW.

The opinion of the Circuit Court of Appeals of the Tenth Circuit is dated February 26, 1942, a copy is in the Record, beginning with page 43, and the case is reported in 126 F. (2d) 719. The case was heard before Judge Phillips, Bratton and Murrah. Following the decision your petitioner filed a petition for rehearing (Record, pp. 49-52) which petition was denied on April 27, by Honorable Orie L. Phillips, Circuit Judge, and Honorable J. Foster Symes, District Judge.

II.

STATEMENT OF THE CASE.

This statement appears at pages 2 to 4 of this petition and brief and will not be repeated.

III.

Summary of the Argument.

Inasmuch as there are two basic questions raised, either of which if decided in favor of the petitioner is decisive of the case, the brief will be divided into two parts.

The first part of the brief is entitled "Plaintiff's Cause of Action is Community Property, and She Is Not Entitled to Recover." Under this subdivision of the brief we will discuss that phase of the case, separate and apart from the ownership of the car, and as affected by the rule of Conflict of Laws as established by this Honorable Court, the contrary ruling of the Ninth Circuit Court of Appeals involving the identical question, and the applicable Utah decision relating to the question here involved.

The fact that the Supreme Court of the United States, in the cases of *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.,* 313 U. S. 487, 85 L. Ed. 1477, and *Griffin, Admr. v. McCoach, Trustee,* 313 U. S. 498, 85 L. Ed. 1481, decided on June 2, 1941, after having previously left the question open and undecided, has now determined that in diversity of citizenship cases the Federal Courts must follow the Conflict of Laws rules prevailing in the States in which they sit, and that these decisions are not noted or referred to in the opinion of the Circuit Court of Appeals and their application apparently overlooked, would seem to be sufficient warrant for filing this petition. The doctrine of Conflict of Laws, which is now being recognized as of increasing importance because of the Tompkins case, is not referred to in the opinion of the court. True, the court does refer to "the law of comity among states," but nowhere in the decision does the court give consideration to the Conflict of Laws Rules, as established by the Supreme Court of the United States in cases involving diversity of citizenship.

By reason of such newly established rule by the Supreme Court of the United States with reference to Conflict of Laws, the case of *Texas & Pacific Ry. Co. v. Humble,* 181 U. S. 57, upon which the Circuit Court in part bases its decision in this case, has, in our opinion, no controlling application here.

Furthermore, the case of *Traglio v. Harris,* 104 F. (2d) 439, from the Ninth Circuit Court of Appeals, which would seem to have been applicable and upon which the respondent relied as controlling and which is referred to in the decision

of the Court as controlling, has been overruled by that court in its decision in the case of *Jones, Appellant, v. Weaver, Admx., Appellee,* 123 F. (2d) 403, decided November 19, 1941, two days after the argument of the instant case before the Circuit Court, and upon the authority of the two recent cases from the Supreme Court of the United States above referred to. Under the circumstances, there was no opportunity at or prior to the time of the argument to call the attention of the Circuit Court to the fact that the *Traglio case,* which was the *only federal case* either side was able to find applicable to the situation, is no longer the law in the Ninth Circuit, because of the decision in the case of *Jones v. Weaver,* supra.

If further justification for the filing of this petition would seem necessary, we may say that by reason of the decision of the court in this case, there now exists a conflict between the Tenth Circuit Court of Appeals and that of the Ninth Circuit in the case of *Jones v. Weaver,* for the reason that they are squarely opposed to and at variance with each other.

IV.

ARGUMENT.

1. Plaintiff's Cause of Action Is Community Property, and She is Not Entitled to Recover.

At the outset of the discussion of this point, consideration must be given to the recent decisions of the Supreme Court of the United States with reference to conflict of laws and their application to the instant case.

In the case of *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.,* 313 U. S. 487, 85 L. Ed. 1477, decided June 2, 1941, the Court said, at page 1479 of 85 L. Ed.:

> "The principal question in this case is whether in diversity cases the federal courts must follow conflict of laws rules prevailing in the states in which they sit. We left this open in Ruhlin v. New York L. Ins. Co., 304 U. S. 202, 208, note 2, 82 L. Ed. 1290, 1293, 58 S. Ct. 860. The frequent recurrence of the problem, as well as the conflict of approach to the problem between the Third Circuit's opinion here and that of the First Circuit in Sampson v. Channell, 110 F. (2d) 754, 759-762, 128 A. L. R. 394, led us to grant certiorari."

The Court further said at page 1480:

> "Application of the New York statute apparently followed from the court's independent determination of the 'better view' without regard to Delaware law, for no Delaware decision or statute was cited or discussed.
>
> "We are of opinion that the prohibition declared in Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487, against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in co-ordinate state and federal courts sitting side by side. See Erie R. Co. v. Tompkins, supra, at 74-77. Any other ruling would do violence to the principle of uniformity within a state upon which the Tompkins decision is based."

And at page 1481, the court said:

> "Looking then to the Delaware cases, petitioner relies on one group to support his contention that the Delaware state courts would refuse to apply Sec. 480 of the New York Civil Practice Act, and respondent on another to prove the contrary. We make no analysis of these Delaware decisions, but leave this for the Circuit Court of Appeals when the case is remanded."

In *Griffin, Admr. v. McCoach, Trustee,* 313 U. S. 498, 85 L. Ed. 1481, the court said at page 1484-1485 of 85 L. Ed.:

> "For the reasons given in Klaxon Co. v. Stentor Electric Mfg. Co. No. 741 this term, decided today (313 U. S. 487, ante, 1477, 61 S. Ct. 1020), we are of the view that the federal courts in diversity of citizenship cases are governed by the conflict of laws rules of the courts of the states in which they sit. In deciding that the changes made in the insurance contract left its governing law unaffected and that the laws of Texas could not be applied to a foreign contract in Texas

courts, the federal courts were applying rules of law in a way which may or may not have been consistent with Texas decisions. Likewise it is for Texas to say whether its public policy permits a beneficiary of an insurance policy on the life of a Texas citizen to recover where no insurable interest in the decedent exists in the beneficiary. The opinion does not rest its conclusions upon its appraisal of Texas law or Texas decisions but upon decisions of this Court inapplicable to this situation in the light of Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487, and Ruhlin v. New York L. Ins. Co., 304 U. S. 202, 205, 82 L. Ed. 1290, 1292, 58 S. Ct. 860."

So, too, in the opinion in this case, the Circuit Court of Appeals did not base its conclusions upon Utah decisions, but upon the case of *Texas and Pacific Ry. Co. v. Humble,* 181 U. S. 57, which is inapplicable and of no controlling importance, in view of the decisions last referred to of the Supreme Court of the United States; and upon the case of *Traglio v. Harris,* 104 F. (2d) 439, from the Ninth Circuit, which has been overruled in that Circuit by the case of *Jones v. Weaver, Admx.,* 123 F. (2d) 403.

The *Humble* case merely holds that capacity to sue is determined by the law of the forum, and it is not conclusive of the present situation. Such must have been the conclusion reached by the Ninth Circuit Court of Appeals in the case of *Jones v. Weaver,* supra, because the Humble case is not even referred to in the opinion in that case overruling the Traglio case. The *Humble* case would have been applicable, and applicable only if the defendant had been contending that plaintiff's husband must join with her in order to bring the suit.

The defendant in its amended answer pleaded the Texas community property laws and alleged that the cause of action, the nursery business in the pursuance of which plaintiff and her husband were in the State of Utah, as well as the automobile itself, were community property. Upon the trial the plaintiff admitted the existence of these laws so pleaded, and as material to the defense of the case. It was and is petitioner's contention, that such community laws, when pleaded and proven, become an additional fact in the case, which, together with the plea of the contributory negligence of the husband, go to the defense of the action.

What constitutes community ownership and the nature thereof is clearly stated in the case of *LaTourette v. LaTourette,* 15 Ariz. 200, 137 P. 426. That the community property states treat the community as an entity in the nature of a partnership is illustrated by the case of *Milne v. Kane,* 64 Wash. 254, 116 P. 659, 36 L. R. A. (N. S.) 88, wherein it was held that the community was liable for the negligent injury of the plaintiff wife in the operation by the husband of an automobile for the benefit of the community, consisting of husband and wife.

And also that the interest of the wife in community property is not a contingent or inchoate right in the nature of dower in a common law state, but is a vested interest, is evident from the case of *Peterson v. Peterson,* 35 Idaho 470, 207 P. 425, wherein the court says at page 427:

> ". . . . there is no escape from the conclusion that the interest of a wife in the community property is a vested interest, and not an expectancy dependent upon her surviving her husband; . . . ."

Since Texas is the domicil of the plaintiff and her husband this Court must, as a matter of the conflict of laws in this situation, refer to the law of Texas to determine the ownership of plaintiff's cause of action and the recovery. As the Circuit Court of Appeals says in its opinion herein:

> "Broadly stated, it is provided by statute that all property owned by either spouse at the time of marriage, that acquired afterwards by gift, devise, or descent, and the increase of lands thus acquired, shall constitute the separate property of such spouse; and that all property acquired by either during coverture, except that which is separate property of either, shall be deemed to be the common property of both. Revised Civil Statutes of Texas, Secs. 4613, 4614, 4619. The right to recover damages for personal injuries is a property right in that state, and a chose in action for such injuries suffered by a married woman belongs to the community estate. . . . And recovery cannot be had in that state for personal injuries sustained there by a married woman if the negligence of her husband was a contributing cause for the reason that such negligence on his part is imputed to her."

However, we respectfully sumbit that the Circuit Court of Appeals did not follow up to a conclusion the effect of its holding, because it is well settled by the laws of Texas and other community property states that the money recovered for a tort to the wife, as well as the right of action itself, is property of the community. *Northern Texas Traction Co. v. Hill, (Tex. Civ. App. 1927), 297 S. W. 778; Dallas Ry. & Terminal Company v. High, 129 Tex. 219, 103 S. W. (2d) 735.* Also, had the accident happened in Texas, that her husband's negligence would be imputed to plaintiff could not be questioned. *Northern Texas Traction Co. v. Hill (supra); Bostwick v. Texas & Pacific RR. Co., 81 S. W. (2d) 216, (Tex. Civ. App.)* See also cases from other community property states: *McFadden v. Santa Ana, O. & T. Street R. Co., (1891) 87 Cal. 464, 11 L. R. A. 252, 25 P. 681; Basler v. Sacramento Gas & E. Co., (1910) 158 Cal. 514, 111 P. 530, Ann. Cas. 1912A, 642; Dunbar v. San Francisco-Oakland Terminal R. Co., (1921) 54 Cal. App. 15, 201 P. 330; Giorgetti v. Wollaston, (1927) 83 Cal. App. 358, 257 P. 109; Solko v. Jones, 3 P. (2d) 1028, 117 Cal. App. 372; Southern Pacific Co. v. Day, 38 Fed. (2d) 958; Pacific Constr. Co. v. Cochran, (1926) 29 Ariz. 554, 243 P. 405; Ostheller v. Spokane & I. E. R. Co., (1919) 107 Wash. 678, 182 P. 630; Hawkins v. Front Street Cable R. Co., 3 Wash. 592, 28 P. 1021.* Further, that the husband would have an interest in the subject of the action and shares in its recovery is not open to dispute. *31 C. J. 150; Johnson v. Hendrick, 45 Cal. App. 317, 187 P. 782.*

The Community Property states uniformly hold that a cause of action for a tort to a spouse is property (cases cited supra). There may have been some doubt as to this proposition at common law, but certainly not after the cause was reduced to judgment. *Stone v. Boston Railroad,* 7 Gray (Mass.) 539. That the ownership of moveables, regardless of where acquired, is governed by the law of the domicil of the parties, is recognized by the great majority of cases in this country. *McLean v. Hardin,* 56 N. Car. 294, 69 A. D. 740; *Snyder v. Stringer,* (Wash.) 198 P. 733, 116 Wash. 131; *Kraemer v. Kraemer,* (1877) 52 Cal. 302; *Re Burrows,* (1902) 136 Cal. 113, 68 P. 488; *Re Niccolls,* (1912) 164 Cal. 368, 129 P. 278; *Re Boselly,* (1918) 178 Cal. 715, 175 P. 4; *Re Drishaus,* (1926) 199 Cal. 369, 249 P. 515; *Williams v. Sutphen,* (1928) 92 Cal. App. 697, 268 P. 946; *Scott v. Remley,* (1931) 119 Cal. App. 384, 6 P. (2d) 536; *Latterner v. Latterner,* (1932) 121 Cal. App. 298, 8 P. (2d) 870; *Douglas v. Douglas,* (1912) 22 Idaho 336, 125 P. 796; *Martin v. Boler,*

(1858) 13 La. Ann. 369; *Bosma v. Herder,* (1919) 94 Ore. 219, 185 P. 741; *Blethen v. Bonner,* (1902) 30 Tex. Civ. App. 585, 71 S. W. 290; *McDaniel v. Harley,* (1897, Tex. Civ. App.) 42 S. W. 323; *Oliver v. Robertson,* (1874) 41 Tex. 422; *Duke v. Reed,* (1885) 64 Tex. 705; *Re Gulstine,* (1930) 166 Wash. 325, 6 P. (2d) 628; *Re Bruggemeyer,* (1931) 115 Cal. App. 525, 2 P. (2d) 534; *Re Frees,* (1921) 187 Cal. 150, 201 P. 112. See also *Annotation,* 57 L. R. A. 353 and 29 L. R. A. (N. S.) 781.

As a necessary corollary the rule is applicable to choses in action, *Birmingham Water Works Co. v. Hume,* 121 Ala. 168, 25 So. 806, 77 A. S. R. 43; and the rule has also been definitively applied to a cause of action in tort, *Williams v. Pope Manufacturing Co.,* 52 La. Ann. 1417, 27 So. 851, 50 L. R. A. 816, wherein it was held that the legal situs of a claim for damages is at plaintiff's domicil, that where injury occurs in a community property state with plaintiff domiciled in a common law state, the cause of action does not become community property, but on the contrary its ownership and incidents are determined by the domiciliary law. That these principles are sound not only in legal theory, but that they have withstood the practical test of the crucible of juridical experience, is evidenced by their adoption by both the Restatement and the Text Writers. See Restatement Conflict of Laws, Secs. 208 and 290; Beale, The Conflict of Laws, Vol. 2, page 1014, particularly note 4.

In the case of *Keena v. United Railroads of San Francisco,* 207 P. 35 (Calif.), the court said at page 38:

> "In California the earnings of the wife and earnings of the husband are both community property, and the contributory negligence of the husband may be set forth as a defense in an action by him to recover damages for an injury sustained by the wife."

As the Circuit Court states in its opinion herein, "The right to recover damages for personal injuries is a property right in that state (Texas), and a chose in action for such injuries suffered by a married woman belongs to the community estate."

It is said in 31 C. J. at page 14,

> "Personalty is generally controlled by the law of the owner's domicile. But in the application of this

rule to the determination of the question whether personalty is controlled by community laws a distinction has been made between tangible property and choses in action, the former being held to be subject to the law of the state where it is actually situated, and the latter by the law of plaintiff's domicile."

As is stated in *31 C. J. 150:* "The money recovered is community property, and he (the husband) has an interest in the subject of the action."

In the case of *Johnson v. Hendrick,* 45 Cal. App. 317, 187 P. 782, the court said: "Money recovered for damages to the wife in this state has always been held to be community property, because it was not owned by the wife before marriage, nor acquired afterward by gift, devise or descent."

Pursuant to the same rule of law in community property states, it was held in the case of *Swager v. Peterson,* 291 P. 1049 (Idaho), that a note purchased by a wife from her husband, from proceeds of a recovery for personal injuries to her, was community property.

In the case of *Newberry v. Remington, et ux,* 52 P. (2d) 312 (Wash.), it was held that the marital community is liable for tortious acts of the husband where the tortious acts are committed in the management of the community property or for the benefit of the community; and such is the situation in this case. See also *Blashfield Cyc. of Auto Law,* Vol. 4, page 323; Vol. 5, Sec. 3162, page 332; Vol. 9, Sec. 5862, page 59.

The legal situs of a claim for damages is the plaintiff's domicil, and as held in the case of *Williams v. Pope Manufacturing Co.,* 52 La. Ann. 1417, 27 So. 851, 50 L. R. A. 816, where injury occurs in a community property state, with plaintiff domiciled in a common law state, the cause of action does not become community property, but on the contrary its ownership and incidence are determined by the domiciliary law.

Then, since under the Texas law the cause of action and the recovery are community property, the negligence of plaintiff's husband must be imputed to her, to prevent the anomaly of a husband benefiting by his own wrong.

"No state can make a law which by its own force is operative in another state; the only law in force in the sovereign state is its own law; but by the law

> of each state rights or other interests in that state may, in certain cases, depend upon the law in force in some other state or states. That part of the law of each state which determines whether in dealing with a legal situation the law of some other state will be recognized, is called the Conflict of Laws."
>
> *Restatement of Law of Conflicts,* page 1.

The courts in Utah do not apply the Texas law as such, but will look to the law of a foreign state in certain instances to determine certain rights in property, which here is the ownership of plaintiff's cause of action and the ownership of the recovery therefrom. The Texas law is an additional fact in the case in determining whether or not plaintiff is entitled to recover.

In inquiring into and ascertaining the law of a sister state with reference to the title and ownership of property acquired by husband and wife during coverture, the court of the state before which the question comes does not make such inquiry and investigation for the purpose of executing the foreign law within the state, but rather to ascertain the status of the foreign law as a probative fact in ascertaining and establishing the title and ownership of the property in question. In the case of *Douglas v. Douglas,* 22 Idaho 336, 125 P. 796, the court was concerned with property accumulated by husband and wife in Colorado, previous to their becoming domiciled in Idaho, (a community property state) the husband contending that it was his separate property. The court in agreeing with the contention of the husband said:

> "(4) In doing so, he finds it necessary to prove the laws of the state in which he accumulated this personal property and from which he brought it in order to show that it was his separate and individual estate and that his wife, the other member of the community, had no interest in such property.
>
> "(6) It is not, therefore, a question of enforcing and executing a foreign law in this state, but it is merely a question of ascertaining what the foreign law was as one of the probative facts in establishing the ownership of the property."

The Idaho court in its opinion quoted from the opinion of the court in *Blethen v. Bonner*, 30 Tex. Civ. App. 585, 71 S. W. 290, stating:

> "The court in that case was presented with the same proposition that is presented here, namely, that they were called upon to enforce the laws of a sister state within the borders of Texas. The court answered that question as follows: 'It is suggested that this view involves the enforcement of the laws of a sister state by a Texas court in the disposition of property here situated. But not so. We have merely ascertained the law of Massachusetts as a fact in determining the quality or extent of the title to money acquired in Massachusetts by a citizen or citizens of that state, and thereafter brought into and invested in this state."

In the case of *Justis v. Atchison, T. & S. F. Ry. Co.*, 12 Cal. App. 639, 108 P. 328, the plaintiffs Minnie Justis and her husband brought suit against the railroad company to recover for injuries sustained in Arizona. The court said:

> "It is contended by appellant that, under the law of Arizona, and particularly under certain sections of the Revised Statutes of that territory which were read into the record and considered as evidence, without objection, the damages which could be recovered by plaintiffs, or either of them, on the cause of action stated, became and were the separate estate of the wife, and not the property of the community. . . .
>
> * * * * * *
>
> "The right to recover damages for such an injury by a judicial proceeding is property in this state (Civ. Code, Sec. 953); and when acquired after marriage by husband or wife, or both, it is community property. . . .
>
> * * * * * *
>
> "While the complaint and findings, in the absence of demurrer to the former, sustain the judgment on the theory that the action is on the contract, the complaint supports and the evidence justifies the finding of the trial court that, 'under the laws of Arizona, a

cause of action for such personal injuries to the wife and the fruits thereof were community property,' if the action be considered as based upon the tort instead of the contract. The same conclusion would be reached whether the Arizona law introduced is considered as 'evidence,' or as a law to be construed as such, notwithstanding it is required by the statute to be introduced in evidence in the same manner as the facts in the case. . . .

* * * * * *

"The general effect of the statutes of Arizona before us, other than section 3111, is to declare the law of that territory with respect to common property to be practically the same as that of this state, and the introduction in evidence of these statutes served merely to confirm the presumption which should have governed the decision of the superior court, in which the case was tried, if no such evidence had been introduced. . . .

* * * * * *

"The law of California thereby became the law of Arizona as to these plaintiffs, and the finding of the trial court that the cause of action for the personal injuries to the wife was community property was a proper deduction from the law and evidence. Judgment affirmed."

In order to give effect to the two recent decisions of the Supreme Court of the United States, holding that the Federal Courts must follow the conflict of laws rules prevailing in the states in which they sit, consideration must of course be given to the decisions of the State of Utah to determine not only whether the plaintiff had the right to bring the cause of action sued upon, but also whether or not she is the sole owner of such cause of action and the right of recovery, unaffected by reason of the fact that, as the Circuit Court has found, such cause of action is community property and that the husband was found by the jury to be guilty of contributory negligence. It becomes necessary to ascertain what effect the Supreme Court of Utah has given to the laws of other states as a probative fact in ascertaining and establishing title and ownership of property.

In the case of *Stuart v. Pederson*, 41 Utah 308, 125 P. 395, which involved the title to personal property of a resident of Colorado who died in that state, intestate, the plaintiff relied upon the laws of the State of Colorado with reference to succession, to the effect that the personal property of any person dying intestate in that state shall at his death descend to his surviving widow, if he have no issue. The Supreme Court of Utah in that case gave effect to the said statute of the State of Colorado with reference to succession.

Plaintiff in this action relied upon *Section 40-2-4, Revised Statutes of Utah, 1933*, which provides that a married woman may recover in the State of Utah for personal injuries as though she were unmarried, and that the recovery shall include medical or other expenses paid or assumed by the husband. The Circuit Court of Appeals in its opinion says, "no case has been called to our attention in which the statute was construed."

The Circuit Court of Appeals is in error in this statement. It is most evident that it overlooked the case of *Nielsen v. Watanabe*, 90 Utah 401, 62 P. (2d) 117, which was an action brought by Mrs. Florence Nielsen, wife of Jesse H. Nielsen, pursuant to Section 40-2-4, Revised Statutes of Utah, 1933, against a third party (defendant Watanabe) for personal injuries sustained by her. Plaintiff and her husband were residents of the State of Idaho, a community property state, and had traveled from that state to Garland, Utah, in a car which under the Idaho law was of necessity the community property of herself and husband. The car was driven by her husband. Had the accident occurred in Idaho, her husband would have been obliged to join her in the action, but the injury occurring in Utah, and the action being brought in Utah, the wife sued individually, pursuant to Section 40-2-4, R. S. U. 1933. The fact that plaintiff and her husband were residents of the State of Idaho is apparent not only from the opinion in the case, in which it is stated that the automobile was community property, but also from paragraph 8 of the complaint, in which it was alleged: "That as soon as the said plaintiff was able to be taken to her home in Idaho she was taken from said hospital and confined to her bed in her home in Idaho Falls, Idaho."

The trial court sustained the demurrer of the defendant on the ground that the complaint showed on its face as a matter of law, that plaintiff's husband, Jesse H. Nielsen, the driver of the community owned automobile, was negligent.

The Supreme Court of Utah said in its opinion "No claim is made that the allegations of the complaint failed to allege sufficient facts to charge defendant with negligence." And further said: "Under the facts alleged by her she was responsible for the negligence, if any, of her husband."

However, the Supreme Court of Utah did reverse the ruling of the trial court sustaining the demurrer, but did so for the reason expressed in the conclusion of its opinion, as follows:

> "Under such circumstances it may not be said that plaintiff's husband was, *as a matter of law,* guilty of contributory negligence. 3-4 Huddy Cyclopedia of Automobile Law (9th Ed.) p. 59, Sec. 30 and cases there cited. Thus no facts are alleged which show that either plaintiff or her husband was guilty of contributory negligence. Evidence properly admissible under the complaint may show that plaintiff and her husband were free from negligence proximately contributing to the injuries and damage complained of."

However, in the case at bar the jury, in answer to special interrogatories, found that the plaintiff's husband, W. D. Dyess, was guilty of negligence proximately contributing to plaintiff's injuries.

It is apparent from the foregoing that the Supreme Court of Utah in the foregoing case construed Sec. 40-2-4, R. S. U., 1933, holding that where husband and wife, residents of a community property state such as Idaho, come into the State of Utah and there have an accident while the husband is driving the car, that while the wife may bring the action under the aforesaid section, she is nevertheless charged with his contributory negligence.

It is therefore manifest that the identical situation in the case at bar has been recently passed upon by the highest court of Utah, and hence the Federal Court, under the rule announced by the Supreme Court of the United States in the two cases above referred to, must follow the cases of *Stuart v. Pederson* and *Nielsen v. Watanabe,* supra, as determining the conflict of laws existing and established by the Supreme Court of Utah in such cases.

> "The rules of Conflict of Laws are part of the law of each common law state, and as such are bind-

ing upon the courts as any other parts of the law of the state."

Restatement of Law on Conflicts, page 9.

We did not contend in the trial court and do not now contend that the plaintiff did not have the right herself and alone to bring the action, but we do contend that the Texas community property laws must be given effect and that pursuant to the rule announced in *Nielsen v. Watanabe,* the negligence of the husband driver of the car is a matter going to the defense of the action, affecting the wife's right to recover, but not her right to maintain the action. *The statute giving the wife the right to sue cannot be construed as taking from the defendant any defense that it may have.* However, such is in effect the ruling of the court in this case.

It is now established law in Utah, by the case of *Nielsen v. Watanabe,* that the plaintiff cannot recover in this action.

If the jury had found in the instant case that the plaintiff's husband was not guilty of contributory negligence, an entirely different situation would have been presented, because, as stated in the case of *Nielsen v. Watanabe,* the evidence in that case might show that neither the plaintiff nor her husband was guilty of negligence. The instant case was tried and submitted to the jury for it to determine whether the plaintiff was guilty of negligence, and if her husband was guilty of negligence, the trial court reserving for later determination, following the rendition of the verdict, what would be the effect in law if the husband was found guilty of contributory negligence.

The ruling of the Circuit Court of Appeals herein that Sec. 40-2-4, R. S. U. 1933, embraces both substantive and remedial rights, and not only authorized plaintiff to maintain the action, but vested in her the recovery, we respectfully submit is an oversimplification of the question involved.

The Court failed to give proper application to the Utah cases and the conflict of laws rules as established by the Supreme Court of the United States. Furthermore, the Court erroneously agreed with the contention of the plaintiff that the *Humble* case, supra, and the *Traglio* case, supra, are controlling.

True enough, as the Court says, Section 40-2-4, Revised Statutes of Utah, 1933, makes no distinction between resi-

dents and nonresidents, and it empowers a married woman to maintain in her own name a suit to recover for personal injuries sustained by her. But such right so granted her to bring such an action does not deprive the defendant of the defense that the automobile is the joint or community property of herself and her husband, and that the husband's negligence, if any, was a proximate cause of the accident barring her recovery. *To permit a wife from a community property state to recover for personal injuries in such circumstances, and to deprive a wife who is a resident of the State of Utah, occupying a car jointly owned by herself and her husband, from such recovery, would amount to giving nonresident wives a better status in the court than that of wives who are residents of the State of Utah. That the Utah Supreme Court did not construe the statute as giving any such nonresident wife such a preferred status is evident from the decision in the case of Nielsen v. Watanabe, supra, which not only established the rule of conflict of laws, but the public policy of the State of Utah.*

In *Beale on Conflicts of Laws*, on page 6151, it is said:

> "Since the local court is necessarily the best judge of the public policy of the jurisdiction in which it sits, it would indeed be presuming a great deal to suggest that its conclusions in such matters are mistaken."

The foregoing is in accordance with the expression of the Supreme Court of the United States in the two cases hereinbefore referred to decided on June 2, 1941.

As the Circuit Court says in its opinion in this case: "The right to recover damages for personal injuries is a property right in that state (Texas), and a chose in action for such injuries suffered by a married woman belongs to the community estate." The Texas statute makes no distinction as to where such cause of action arises. Whether within or without the state, it is always community property, and the ownership thereof follows the law of the domicil of the owner.

The Circuit Court in its decision herein states that "the rule of law in Texas with reference to the question has no controlling application here," and cites the *Traglio* case as authority.

In the *Traglio* case the Appellant made the same contentions as we have made in this case, as is apparent from the brief of appellant's authorities shown at page 803 and 804

of 127 A. L. R. In the footnote following the report of *Traglio v. Harris* in 127 A. L. R., it is said at page 813:

> "The dissenter seems to take the view that the question as to whether the beneficial interest in the recovery, of a person chargeable with contributory negligence, would defeat the right of a plaintiff not himself chargeable with such negligence, does not go to the creation of the cause of action, so as to be determinable by the lex loci delicti, but to a defense to a cause of action otherwise complete in itself."

Such was and is our contention in this case.

However, the Ninth Circuit Court of Appeals, reversed the *Traglio* case by its decision in the case of *Jones, Appellant, v. Weaver, Admx., Appellee,* 123 F. (2d) 403. Judge Stephens, who wrote the dissenting opinion in the *Traglio* case, must have had real satisfaction in writing the opinion in *Jones v. Weaver,* because it is apparent that he was able to convince his colleagues that he was right in his dissenting opinion in the *Traglio* case.

For the purpose of briefly stating the issues, we take the following from the syllabus in the case of *Jones v. Weaver:*

> "In diversity of citizenship cases, federal courts must follow the Conflict of Laws rules prevailing in the States in which they sit. In action against alleged owner of car involved in an accident, the federal district court sitting in Arizona was bound to look to the Conflict of Laws rules of Arizona to determine what the effect that the fact that the owner and his wife, who was driving the automobile at the time of the accident, were California residents, would have upon the issues involved. Under Arizona law the character of property acquired during marriage is determined by the law of the matrimonial domicil at the time of the acquisition of the property."

In *Jones v. Weaver,* Judge Stephens speaking for the court, said:

> "The defendant cites *Traglio v. Harris,* 104 Fed. (2d) 439, recently decided by this Court, and argues from that case that irrespective of the fact that the

automobile involved in the accident was acquired by the defendant and his wife in California at a time when they were residents of that State, still the Arizona law should be applied in its entirety since the accident occurred there.

"It is true that in *Traglio v. Harris* this Court, one member dissenting, rejected the argument that the ownership of the cause of action should be determined by the law of the domicile of the plaintiff instead of by the law of the place of the tort. And it may be that a logical conclusion to be drawn from the Traglio case would lead to a decision for the defendant herein. However, the United States Supreme Court has spoken upon the subject since this Court's decision in *Traglio v. Harris,* in the case of *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.,* 313 U. S. 487, and the latter case prevents any such construction of *Traglio v. Harris,* holding that in diversity of citizenship cases, the federal courts must follow the conflict of laws rules prevailing in the states in which they sit. Under this ruling the District Court was bound to look to the conflict of laws rules of the State of Arizona to determine what effect the fact that the defendant and his wife were California residents would have upon the issues involved."

The foregoing discussion brings us to consideration of the question of the ownership of the car, agency of the husband in operating the same, and joint venture, which are entirely separate and apart from the contention made with reference to the ownership of the cause of action itself.

2. Joint or Community Ownership of the Car, Resulting in Joint Enterprise.

As the Circuit Court of Appeals says in its opinion, referring to the case of *Fox v. Lavender,* 89 Utah 115, 56 P. (2d) 1049, it is the law in Utah that where joint owners of an automobile are traveling together in it at the time of an accident with resulting injury or damage, the driver is operating it on behalf of himself and the other present owner or owners. However, the court said that aside from the recital in the agreed statement of facts "that he (the husband) purchased

the automobile about a year prior to the time of the accident, and that he was the owner of it, . . . the record is silent on the question of ownership." Let us look at the record and the theory upon which this case was tried.

The appellee made a complete about-face in the appellate court with reference to the ownership of the car, which upon the trial of the case was conceded to be community property, just as was the nursery business of the plaintiff, in the furtherance of which they were in the State of Utah, and as was the cause of action itself. If such were not the fact, then why all the recital in the agreed statement of the case (Record, p. 34) with reference to the business of the plaintiff's husband, the purpose of the trip to Utah, what other employees of the company were doing in Utah, and other details with reference to the purpose of the trip and the nature of the business conducted; the admission by the plaintiff that the Texas community laws were in existence, instead of an objection to their materiality on the ground that the same were immaterial; the statement therein that the case was submitted to the jury to determine whether the husband W. D. Dyess was guilty of negligence and if so whether the same was a proximate cause of the accident; the error in the failure of the court to give the instructions referred to in the statement with reference to joint ownership and joint enterprise, which in their final analysis related to the ownership of the car; and the notations made on the said instructions that the ruling on the requested instructions so made was reserved pending the verdict by the jury and the answer to the special interrogatories as to whether or not plaintiff's husband was guilty of negligence. (Record, pp. 21-24) If he had been found not guilty of negligence there would have been no occasion to give further consideration upon motion for judgment notwithstanding the verdict, as to what effect the community ownership of the car and the cause of action had upon the issues in the case. It is well settled that a case will not be reviewed on a theory different from that on which it was tried below.

The defendant in its amended answer alleged, as shown at page 19 of the record, that the automobile was:

> "the common or community property of the plaintiff and her said husband, and said community property was jointly owned and possessed by her and her said husband; that the plaintiff and her husband, at the time of the accident complained of, were in the State

> of Utah in the furtherance of and for the benefit of the said community consisting of husband and wife; that in operating the said automobile at the time and place alleged in the complaint, the said W. D. Dyess was acting for and on behalf of the community, as well as the agent of the plaintiff, and therefore the acts and negligence on his part herein set forth are imputable to her."

The plaintiff filed no reply to such allegations of affirmative matter going to the defense of the action, but as is recited in the statement of facts, agreed that such Texas community laws were in existence. The agreed statement of facts shows that plaintiff and her husband were married sixteen years ago, that the nursery business in which he was engaged had been acquired seven years ago, and at page 35 of the record it is stated, "The automobile was purchased by him about a year previous to the time of the accident, and *he testified* that he was the owner of the said automobile."

It will be noted that it was not agreed, as stated in the opinion of the court, that "he was the owner of it," but merely that he *testified* that he was the owner of it, which is nothing more nor less than a legal conclusion, and one contrary not only to the theory upon which the case was tried, but contrary to law, because, as is stated in the opinion of the Circuit Court of Appeals, "all property acquired by either during coverture, except that which is separate property of either, *shall be deemed* to be the common property of both. Revised Civil Statutes of Texas, Secs. 4613, 4614, 4619." (Italics ours.) The automobile in question was therefore *deemed* to be the common property of the husband and wife. Note the use of the word "deemed" in the statute.

> "The word (deem) is derived from the Anglo-Saxon 'deman,' and etymologically does not differ from 'doom,' 'damn,' or 'condemn.'"
>
> *18 C. J. 450.*

> "Deemed is often used in the sense of held, adjudged; judged; considered; conclusively considered; decreed; determined; accounted; declared; presumed."
>
> *18 C. J. 451.*

In the case of *Swager v. Peterson,* 291 P. 1049 (Idaho), the court said at page 1050:

> "(2) Respondent's testimony that she purchased the note with her own separate funds, and was the owner and holder thereof, amounts to a legal conclusion having insufficient evidentiary value to overcome the presumption that it is community propery. Respondent must go further and prove that she owned the note before marriage, or acquired it 'during marriage through a legally recognized source of separate ownership, and the proofs must go to the very point of showing the fact of such an acquisition.' "

In the case of *Kohny v. Dunbar,* 121 P. 544 (Idaho), the court quoted from the opinion of Chief Justice White in the case of *Warburton v. White,* 176 U. S. 485, 20 Sup. Ct. 44, 44 L. Ed. 555, carried to the Supreme Court by writ of error from the Supreme Court of Washington, as follows:

> "Property acquired during marriage with community funds becomes an acquet of the community, and not the sole property of the one in whose name the property was brought . . ."

In the case of *Radermacher v. Radermacher,* 100 P. (2d) 955 (Idaho), the court said at page 961:

> "Regardless of the view announced in the early cases, it is safe to say the doctrine is now firmly established in Idaho that the wife's interest in the community property is a present, vested interest, equal to that of the husband in all particulars other than the right to management and control, and is not a mere expectancy."

It is evident that the appellee seized upon the expression in the agreed statement of facts that "*he testified* that he was the owner" in an effort to avoid the theory upon which the case was tried.

To further illustrate the theory upon which the case was tried, note the special interrogatories at page 23 of the record, wherein the court asked the jury to find in interrogatory No. 2, "Was Mr. Dyess, the driver of the automobile in question,

negligent . . . . ?'' And in interrogatory No. 9, on page 24 of the record with reference to Mr. Dyess, ''the driver of the automobile.'' Mr. Dyess was not referred to at any time during the trial as the *owner,* but on the contrary as the *driver* of the automobile, the ownership of which was to be determined by the court from the laws of Texas, and not from the mere statement, to which neither the court nor any party to the action gave any attention, that ''he testified that he was the owner of it.''

Furthermore, as is shown in the record at pages 36 and 37, the wife testified that the business was ''our business,'' and that he shared it with her, and in fact shared everything with her, which must of necessity include the automobile, as well as the business, and which of course is pursuant to the community property laws of the State of Texas.

It has been many times established as the law that a case should not be disposed of on appeal upon an entirely different theory from that acted upon in the trial court. Citation of authority to sustain this proposition would seem unnecessary.

The trial court would no doubt be just as surprised and shocked as we were to find appellee contending in the Circuit Court of Appeals, contrary to her contention in the trial court, that the issue of ownership was settled by such statement of a conclusion by Dyess that he was the owner of the car.

It is apparent from the record herein that this case was tried by both parties and by the court upon the tacit understanding that the cause of action, the nursery business of the plaintiff in the furtherance of which appellee and her husband were in the State of Utah, and the car itself, were community property; and this, too, nothwithstanding the gratuitous statement of plaintiff's husband that he was the owner of the car. In the lower court neither the court nor the parties gave any effect to Dyess' statement. No doubt by this he meant that it was registered in his name, and nothing more. Such statement, of course, did not determine ownership, because the court and the parties of necesity treated ownership as a legal conclusion to be determined by the court from all the facts and circumstances in the case, as affected by the Texas community property laws that all such property is deemed to be community property.

It is apparent that the contention made by appellee throughout the trial was not that the Texas Community property laws did not exist, nor that Dyess was the owner of the car; but the sole contention made was that the Texas community property laws were not applicable. That was the issue.

Proper application of the Texas laws of necessity makes the automobile, as well as plaintiff's cause of action, community property.

While the Circuit Court of Appeals in its opinion in this case quotes from and accepts the community property laws to the effect that all property acquired by either spouse during coverture "shall be deemed to be the common property of both," it erred in not holding that the automobile was the property of the community, because of the express language of the statute, and the court further erred in placing the burden of proving that said automobile was the property of the community upon the appellant, rather than upon the appellee to prove, pursuant to the language of the statute, affirmatively to the contrary.

In the case of *Wilson v. United States* in the Ninth Circuit Court of Appeals, 100 F. (2d) 552, it was held in accordance with the established rule of law that:

> "Whether property is separate property of a husband or community property must be determined from the proof of the mode of acquisition thereof, rather than the declarations of the parties to the suit involving such action."

In the case of *Johnson v. Commissioner of Internal Revenue* in the Eighth Circuit Court of Appeals, 105 F. (2d) 454, the court held that where a husband and wife left Texas and moved to Missouri, the property which was community property while they were in Texas continued to be community property, and that the husband held one-half of the property in trust for his wife. The court said:

> "Merely as a matter of Texas law the family fortune was community property. When the taxpayer and his wife left Texas, what was community property at the time continued to be community property."

In the case of *Falk v. Falk*, 120 P. (2d) 714 (Cal.), the court said at page 717:

> "The burden is upon the one who controverts the presumption to prove his claim regarding the character of property acquired during the marriage. Unless that contention is supported by satisfactory proof, the trial court is bound to decide the controversy in accordance with the presumption."

See also *In Re Allen's Estate*, 82 P. (2d) 190 (Cal.); *Beakley v. City of Bremerton*, 105 P. (2d) 40 (Wash.); *Aker v. Aker*, 20 P. (2d) 796 (Idaho).

In the case of *O'Malley & Co. v. Lewis*, 28 P. (2d) 283, (Wash.), it is said at page 286:

> "The fact that the marital relation exists, and that the business conducted by a husband is his ordinary business, of necessity, raises the presumption that the business is a community business. Hendrickson v. Smith, 111 Wash. 82, 189 P. 550."

The court in the case of *In re Wilson's Estate*, 53 P. (2d) 39 (Nev.), the court said at page 343:

> "(5) All property acquired after marriage is presumed to be community property. Jones v. Edwards, 49 Nev. 299, 245 P. 292; Barrett v. Franke, 46 Nev. 170, 208 P. 435.
>
> "(6) The true test of the separate or community character of property acquired during marriage ordinarily lies in whether it was acquired by community funds and community credit or by separate funds. Rawlings v. Heal, 111 Wash. 218, 190 P. 237; 31 C. J. 23.
>
> "(7) The community estate may be vested in either spouse, and the true character of the property is to be determined by the nature of the transaction under which it is acquired *without reference to who* retains the title. *Killian v. Killian*, 10 Cal. App. 312, 101 P. 806; Benson v. Hunter, 23 Ariz. 132, 202 P. 233; Patterson v. Bowes, 78 Wash. 476, 139 P. 225. (Italics ours.)

* * * * * *

"Generally property purchased by either husband or wife during the existence of the community is community property—the 'ultimately determinative consideration in any case being whether the purchase was made with community or with separate funds.' 31 C. J. 36."

In the case of *Benson, et al., v. Hunter,* 202 P. 233 (Ariz.), the court said at the bottom of page 233:

"However, we think the presumption of law is, in the absence of the contrary showing, that all property acquired and all business done and transacted during coverture, by either spouse, is for the community."

Such is the presumption, apparently, in all community property law states. However, the Texas statute goes even farther, and states that property acquired by either spouse during coverture shall be *deemed* to be community property.

No motion was made by the plaintiff appellee to strike from defendant's amended answer the allegations with reference to the community property laws of Texas, as a result of which the car must of necessity be community property, but on the contrary, the appellee was obliged to admit the existence of such laws which were produced at the trial.

In the pretrial order, shown at page 16 of the record, the *issues of law* to be determined by the trial court were:

"Whether under Texas law the car in question was community property.

"Whether the plaintiff is chargeable with her husband's negligence, if any, as her agent in the operation of said car.

"The issue of law and of fact whether or not the plaintiff in this action was engaged, at the time of said accident, in a joint enterprise with her husband, the driver of said car."

In the case of *Missouri K. & T. Ry. Co. v. Wilhoit,* 160 F. 440, it was held that where parties with the assent of the court unite in trying a case on the theory that a certain matter is within the issues, they cannot thereafter depart therefrom on appeal.

As we understand it, the purpose of a pretrial order is to narrow the issues, to restrict the evidence and the necessity of proof of uncontradicted matters, to eliminate unnecessary waste of time at the trial, and to designate the issues, and theory upon which the case is to be tried, among which, as prescribed in this case, was the question of law as to the community ownership of the car. The fact that the court specified as involving a question of law only, the ownership of the car by reason of the community laws of Texas, indicates beyond doubt that no contention was made that the car was the individual property of the husband. Let counsel be bound by the record herein and not escape therefrom by an effort to distort the effect of the husband's testimony by a verbal twist.

It is submitted that the car in question was the joint or community property of plaintiff and her husband, and that therefore the case of *Fox v. Lavender,* 89 Utah 115, 56 P. (2d) 1049, is controlling upon this court.

Such being the case, the other Utah cases referred to in the opinion of the Circuit Court of Appeals with reference to the status of a plaintiff wife who is a mere guest or invitee in a car owned by her husband or another have no application here.

As stated by the Circuit Court of Appeals in its opinion, herein, there is the remaining contention that the automobile was the property of plaintiff and her husband, and that such community of interest constituted a joint enterprise. That court disposed of that contention, stating that the provisions of the Texas law "that all property acquired by either spouse during coverture is presumed to be the community of both; but that is only a rebuttable presumption, and the parties stipulated in effect that while the property was acquired during coverture it belonged to the husband. The manner in which it was acquired or the source of the funds with which it was purchased was not shown. It may have been purchased with his separate funds acquired by gift, devise, or descent. The contention must fail for want of factual basis establishing community of ownership in the automobile."

What we have heretofore said with reference to the ownership of the car is applicable to petitioner's contention of joint enterprise. As we have hereinbefore pointed out, the statute does not say that there exists a rebuttable presumption, but on the contrary states that all property ac-

quired after coverture by either spouse shall be *deemed* to be the community property of both. Certainly if the automobile were the husband's property, the burden of proving such fell upon appellee, and not upon the appellant, who was entitled to rely upon the specific language of the statute that it should be deemed to be community propery, and the case was tried upon such theory in the trial court. If the automobile was purchased by separate funds of the husband, acquired by him by gift, devise or descent, the law requires him to prove such be the fact. See cases cited supra.

In its opinion in this case the Circuit Court of Appeals cites a number of cases from jurisdictions other than Utah supporting the statement in the opinion that "a guest having no share in the operation and control of the vehicle is not engaged in a joint enterprise with the operator." We have no quarrel with these cases insofar as a guest is concerned, but they have no application to the instant case, inasmuch as the plaintiff was not a guest, but a joint owner of the automobile, and falls within the rule announced in the cases of *Fox v. Lavender* and *Nielsen v. Watanabe*, supra.

True enough, it is stated in the statement of the case at page 35 of the record that "the plaintiff Sada Dyess testified she was invited to accompany her husband on the business trip as a guest."

In preparing the agreed statement of facts, it became necessary to admit that she *had testified* that she was a guest, but after all, whether or not she was a guest is a legal conclusion to be determined from all the facts and circumstances set forth in the statement of facts with reference to the purpose and objects of the trip to Utah and what was accomplished in Utah.

The statement of Dyess to the effect that he was the owner of the car, and the testimony of Mrs. Dyess that she accompanied him as a guest, are purely legal conclusions and not evidence of any fact, and hence not binding on the court, because the court itself must of course draw its own conclusions of law from all the facts and circumstances.

The trial court submitted the case to the jury for it not only to render a general verdict dependent upon its findings as to whether the defendant was guilty of negligence, but also to make a special finding as to whether or not plaintiff's husband was guilty of contributory negligence, reserving unto itself for later determination what the legal effect of an af-

firmative finding with reference to the husband's negligence should have upon the issues, by reason of the application of the Texas community property laws. (Record, p. 23)

At the pretrial of the case, and at the actual trial of the case, had the defendant admitted plaintiff was a mere guest, and that Dyess was the owner of the car, the pretrial order made and entered following the pretrial as to the issues on those questions, and the specific interrogatories to the jury with reference to the negligence of Dyess, would not have been given, because then there would have been no occasion for such special interrogatories.

It is established law, in other non-community property states as well as in Utah, that where a wife is injured in a car jointly owned by her and her husband, and operated by him, she is barred from recovering as against a third party by her husband's contributory negligence. *Emerich, et al., v. Bigsby, et al.*, 231 Wis. 473, 286 N. W. 51 (1939); *Perrin v. Wells*, 22 S. W. (2d) 863 (Mo. App. 1930). The same rule is applicable to other joint owners. *Tannenhill v. Kansas City C. & S. R. R. Co.*, 279 Mo. 158, 213 S. W. 818 (Mo. 1919); *Clark v. Hampton*, 83 N. H. 524, 145 Atl. 265, 61 A. L. R. 1171.

V.

CONCLUSION

If the decision rendered in this case becomes final, it will establish a rule of law in the Federal Court in this Circuit with respect to the right of a married woman coming from a community property state to recover for personal injuries notwithstanding the fact that the negligence of her husband was a proximate cause of the same, contrary to the rule established by the Supreme Court of Utah in the case of *Nielsen v. Watanabe*, supra, and to the rule established in the Ninth Circuit by the case of *Jones v. Weaver*, pursuant to the decision with reference to Conflict of Laws recently announced by the Supreme Court of the United States.

The petitioner urges that the Writ of Certiorari should issue, because the decision of the Circuit Court of Appeals is in conflict with: (a) The decisions of the Supreme Court of the United States with respect to Conflict of Laws; (b) The decision of the Circuit Court of Appeals in the Ninth Circuit on the same matter; (c) The applicable decisions of the Supreme Court of the State of Utah; (d) That the decision

herein is repugnant to the Due Process Clause of the Fifth Amendment to the Federal Constitution; (e) The public interest will be promoted by the establishment by this Court of a uniform rule of law; (f) The Circuit Court of Appeals by its decision herein sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings; and (g) It was the manifest duty of the trial court to have granted petitioner's motion for judgment notwithstanding the verdict.

The jury's finding that the plaintiff's husband was guilty of negligence proximately contributing to plaintiff's injuries bars her recovery herein for two reasons: (a) the applicable Utah decisions so hold; and (b) even if there were no Utah cases so holding, for the further and independent reason that the plaintiff's domicil being in Texas, a community property state, the cause of action herein sued upon and the recovery are community property, as held by the Ninth Circuit Court of Appeals in the case of *Jones v. Weaver,* supra.

To allow the judgment herein to stand permits plaintiff's husband as well as herself to benefit by his negligence, which ruling, we respectfully submit, violates the Due Process Clause of the Fifth Amendment.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue from this Court directed to the Circuit Court of Appeals of the Tenth Circuit.

Respectfully submitted,

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Attorney for Defendant, Petitioner.